

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

May 16, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

AMBER LYNN S.,

Plaintiff,

v.

MARTIN O'MALLEY,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

No: 2:22-cv-00258-LRS

ORDER REMANDING THE  
COMMISSIONER'S DECISION

BEFORE THE COURT are the parties' briefs. ECF Nos. 14, 18. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Amy M. Gilbrough. Defendant is represented by Special Assistant United

<sup>1</sup> Martin O'Malley became the Commissioner of Social Security on December 20, 2023. Pursuant to Rule 25(d) of the Rules of Civil Procedure, Martin O'Malley is substituted for Kilolo Kijakazi as the Defendant in this suit.

ORDER - 1

1 States Attorney Jeffrey E. Staples. The Court, having reviewed the administrative  
2 record and the parties' briefing, is fully informed. For the reasons discussed below,  
3 Plaintiff's brief, ECF No. 14, is granted and Defendant's brief, ECF No. 18, is  
4 denied.

### 5 JURISDICTION

6 Plaintiff Amber Lynn S.<sup>2</sup> (Plaintiff), filed for disability insurance benefits  
7 (DIB) on March 23, 2020, alleging an onset date of February 1, 2017.<sup>3</sup> Tr. 256-57.  
8 Benefits were denied initially, Tr. 147-61, and upon reconsideration, Tr. 171-75.  
9 Plaintiff appeared at a hearing before an administrative law judge (ALJ) on August  
10 31, 2021. Tr. 73-104. On September 20, 2021, the ALJ issued an unfavorable  
11 decision, Tr. 27-47, and the Appeals Council denied review, Tr. 1-7. The matter is  
12 now before this Court pursuant to 42 U.S.C. § 405(g).

---

15 <sup>2</sup> The court identifies a plaintiff in a social security case only by the first name and  
16 last initial in order to protect privacy. *See* Local Civil Rule 5.2(c).

17 <sup>3</sup> Plaintiff filed a prior Title II claim alleging disability beginning April 1, 2018.  
18 On November 27, 2019, a different ALJ issued an unfavorable decision finding  
19 Plaintiff not disabled through that date. Tr. Tr. 105-27. The decision was not  
20 appealed and is therefore administratively final. Tr. 30. At the hearing, the  
21 alleged onset date was amended to December 19, 2019. Tr. 76.

## BACKGROUND

The facts of the case are set forth in the administrative hearings and transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are therefore only summarized here.

Plaintiff was 47 years old on her date last insured. Tr. 76. She has work experience as a pet grooming instructor, grooming salon manager, and running her own pet grooming business. Tr. 95-96. She testified that since the prior ALJ decision, she has become more anxious, more isolated, and more "shut down." Tr. 80. She takes medication for bipolar disorder, anxiety, and a mood stabilizer. Tr. 82-83. Plaintiff testified that she has difficulty leaving her property due to anxiety. Tr. 85-86. She has good days and bad days. Tr. 86-87. On bad days, she experiences uncontrollable crying and lounges or lays in bed all day. Tr. 87. She is "triggered" daily and she becomes agitated, freezes, cannot make decisions, and becomes confused and emotional. Tr. 89. She has panic attacks. Her ankles hurt, so she has difficulty walking. Tr. 88, 91. She ices her ankle three to four times a day. Tr. 92.

## STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158

1 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable  
2 mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and  
3 citation omitted). Stated differently, substantial evidence equates to “more than a  
4 mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted).  
5 In determining whether the standard has been satisfied, a reviewing court must  
6 consider the entire record as a whole rather than searching for supporting evidence in  
7 isolation. *Id.*

8 In reviewing a denial of benefits, a district court may not substitute its  
9 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
10 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
11 rational interpretation, [the court] must uphold the ALJ’s findings if they are  
12 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674  
13 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s  
14 decision on account of an error that is harmless.” *Id.* An error is harmless “where it  
15 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115  
16 (quotation and citation omitted). The party appealing the ALJ’s decision generally  
17 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.  
18 396, 409-10 (2009).

## FIVE-STEP EVALUATION PROCESS

A claimant must satisfy two conditions to be considered “disabled” within the meaning of the Social Security Act. First, the claimant must be “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A). Second, the claimant’s impairment must be “of such severity that he is not only unable to do his previous work[,] but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A).

The Commissioner has established a five-step sequential analysis to determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 404.1520(b).

If the claimant is not engaged in substantial gainful activity, the analysis proceeds to step two. At this step, the Commissioner considers the severity of the claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers from “any impairment or combination of impairments which significantly limits [his or her] physical or mental ability to do basic work activities,” the analysis proceeds to

1 step three. 20 C.F.R. § 404.1520(c). If the claimant's impairment does not satisfy  
2 this severity threshold, however, the Commissioner must find that the claimant is not  
3 disabled. 20 C.F.R. § 404.1520(c).

4 At step three, the Commissioner compares the claimant's impairment to  
5 severe impairments recognized by the Commissioner to be so severe as to preclude a  
6 person from engaging in substantial gainful activity. 20 C.F.R. §  
7 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the  
8 enumerated impairments, the Commissioner must find the claimant disabled and  
9 award benefits. 20 C.F.R. § 404.1520(d).

10 If the severity of the claimant's impairment does not meet or exceed the  
11 severity of the enumerated impairments, the Commissioner must assess the  
12 claimant's "residual functional capacity." Residual functional capacity (RFC),  
13 defined generally as the claimant's ability to perform physical and mental work  
14 activities on a sustained basis despite his or her limitations, 20 C.F.R. §  
15 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

16 At step four, the Commissioner considers whether, in view of the claimant's  
17 RFC, the claimant is capable of performing work that he or she has performed in the  
18 past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is capable  
19 of performing past relevant work, the Commissioner must find that the claimant is  
20 not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of performing  
21 such work, the analysis proceeds to step five.

1 At step five, the Commissioner should conclude whether, in view of the  
2 claimant's RFC, the claimant is capable of performing other work in the national  
3 economy. 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the  
4 Commissioner must also consider vocational factors such as the claimant's age,  
5 education, and past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant  
6 is capable of adjusting to other work, the Commissioner must find that the claimant  
7 is not disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of  
8 adjusting to other work, analysis concludes with a finding that the claimant is  
9 disabled and is therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

10 The claimant bears the burden of proof at steps one through four above.  
11 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
12 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
13 capable of performing other work; and (2) such work "exists in significant numbers  
14 in the national economy." 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d  
15 386, 389 (9th Cir. 2012).

### 16 ALJ'S FINDINGS

17 At step one, the ALJ found Plaintiff did not engage in substantial gainful  
18 activity through her date last insured of June 30, 2020. Tr. 33. At step two, the ALJ  
19 found that through the date last insured, Plaintiff had the following severe  
20 impairments: bipolar disorder and alcohol abuse. Tr. 33. At step three, the ALJ  
21 found that through the date last insured, Plaintiff did not have an impairment or

1 combination of impairments that met or medically equaled the severity of one of the  
2 listed impairments. Tr. 34.

3 The ALJ then found that through the date last insured, Plaintiff had the  
4 residual functional capacity to perform a full range of work at all exertional levels  
5 with the following nonexertional limitations:

6 [T]he claimant could understand, remember, and carry out simple,  
7 routine tasks with short, simple instructions with occasional work-  
8 setting changes and occasional, routine interaction with supervisors;  
9 no team or cooperative tasks but may work in proximity to others with  
10 no required interaction with the general public as an essential element  
11 of the job.

12 Tr. 35.

13 At step four, the ALJ found that through the date last insured, Plaintiff was  
14 unable to perform any past relevant work. Tr. 40. After considering Plaintiff's age,  
15 education, work experience, residual functional capacity, and the testimony of a  
16 vocational expert, the ALJ found that through the date last insured, there were other  
17 jobs that existed in significant numbers in the national economy that Plaintiff could  
18 have performed, such as laundry worker II, unskilled work, or garment sorter. Tr.  
19 42. Thus, the ALJ concluded that Plaintiff has not been under a disability, as  
20 defined in the Social Security Act, at any time through June 30, 2020, the date last  
21 insured. Tr. 42.



## ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying disability income benefits under Title II of the Social Security Act. ECF No. 14.

Plaintiff raises the following issues for review:

1. Whether the ALJ properly considered Plaintiff's symptom testimony;
2. Whether the ALJ properly considered the medical opinion evidence; and
3. Whether the ALJ properly found no severe physical impairment.

ECF No. 14 at 1-2.

## DISCUSSION

### A. Symptom Testimony

Plaintiff contends the ALJ failed to properly consider her symptom testimony. ECF No. 14 at 4-11. An ALJ engages in a two-step analysis to determine whether a claimant's testimony regarding subjective pain or symptoms is credible. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

1 Second, “[i]f the claimant meets the first test and there is no evidence of  
2 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
3 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
4 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
5 citations and quotations omitted). “General findings are insufficient; rather, the ALJ  
6 must identify what testimony is not credible and what evidence undermines the  
7 claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.  
8 1995); see also *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ  
9 must make a credibility determination with findings sufficiently specific to permit  
10 the court to conclude that the ALJ did not arbitrarily discredit claimant’s  
11 testimony.”). “The clear and convincing [evidence] standard is the most demanding  
12 required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir.  
13 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir.  
14 2002)).

15 Factors to be considered in evaluating the intensity, persistence, and limiting  
16 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
17 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
18 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and side  
19 effects of any medication an individual takes or has taken to alleviate pain or other  
20 symptoms; 5) treatment, other than medication, an individual receives or has  
21 received for relief of pain or other symptoms; 6) any measures other than treatment

1 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
2 factors concerning an individual's functional limitations and restrictions due to pain  
3 or other symptoms. Social Security Ruling 16-3p, 2017 WL 5180304, at \*9  
4 (effective October 25, 2017); 20 C.F.R. § 404.1529(c). The ALJ is instructed to  
5 "consider all of the evidence in an individual's record," to "determine how  
6 symptoms limit ability to perform work-related activities." SSR 16-3p, at \*2.

7 The ALJ found the record indicates a history of bipolar disorder and  
8 symptoms including depression, irritability, and problems with social functioning,  
9 but found the record is not entirely consistent with the extent of the symptoms  
10 alleged. Tr. 37.

11 First, the ALJ found the record reflects that Plaintiff's activities are not  
12 consistent with the degree of limitations alleged. Tr. 38-39. It is reasonable for an  
13 ALJ to consider a claimant's activities which undermine claims of totally disabling  
14 pain in assessing a claimant's symptom complaints. *See Rollins v. Massanari*, 261  
15 F.3d 853, 857 (9th Cir. 2001). However, it is well-established that a claimant need  
16 not "vegetate in a dark room" in order to be deemed eligible for benefits. *Cooper v.*  
17 *Bowen*, 815 F.2d 557, 561 (9th Cir. 1987). Notwithstanding, if a claimant is able to  
18 spend a substantial part of her day engaged in pursuits involving the performance of  
19 physical functions that are transferable to a work setting, a specific finding as to this  
20 fact may be sufficient to discredit an allegation of disabling excess pain. *Fair v.*  
21 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Furthermore, "[e]ven where [Plaintiff's

1 daily] activities suggest some difficulty functioning, they may be grounds for  
2 discrediting the claimant's testimony to the extent that they contradict claims of a  
3 totally debilitating impairment.” *Molina*, 674 F.3d at 1113.

4 The ALJ observed that Plaintiff reported she can prepare simple meals, drive,  
5 and do household chores with some prompting, and she spends time watching  
6 television, talking on the phone or video chatting. Tr. 38-39, 306-13. However, the  
7 Ninth Circuit has “repeatedly warned that ALJs must be especially cautious in  
8 concluding that daily activities are inconsistent with testimony about pain, because  
9 impairments that would unquestionably preclude work and all the pressures of a  
10 workplace environment will often be consistent with doing more than merely resting  
11 in bed all day.” *Garrison*, 759 F.3d at 1016; *Vertigan v. Halter*, 260 F.3d 1044, 1050  
12 (9th Cir. 2001) (“This court has repeatedly asserted that the mere fact that a plaintiff  
13 has carried on certain daily activities, such as grocery shopping, driving a car, or  
14 limited walking for exercise, does not in any way detract from her [testimony] as to  
15 her overall disability.”). The ALJ cited no evidence suggesting that these activities  
16 were performed by Plaintiff in a manner transferable to a work setting, nor did the  
17 ALJ describe how these activities contradict her reported symptom claims. *See Orn*  
18 *v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). These activities do not constitute  
19 substantial evidence of daily activities inconsistent with Plaintiff's allegations.

20 The ALJ also noted that Plaintiff said one of her treatment goals was that she  
21 wanted to find work, Tr. 479, and that her “past work history demonstrates much

1 more ability than she alleged at the hearing.” Tr. 39 (citing Tr. 259-60). First,  
2 wanting to work is not the same as being able to work, nor does it shed any light on  
3 a claimant’s ability to work. Second, it is unclear what the ALJ means by  
4 referencing Plaintiff’s work history because the statement is not explained. Tr. 39.  
5 As Plaintiff observes, ECF No. 14 at 10, the ALJ’s decision includes a finding that  
6 she cannot perform her past work, Tr. 40, so there is no inconsistency between  
7 Plaintiff’s allegations and her ability to perform certain jobs before the alleged onset  
8 date. The ALJ’s finding that Plaintiff’s activities are inconsistent with her  
9 allegations is not supported by Plaintiff’s desire to work and work history.

10 The ALJ also noted that before the date last insured, Plaintiff reported driving  
11 to or being in Eastern Washington and spending time with family or friends. Tr. 38-  
12 39, 492, 500, 518. In February 2020, Plaintiff reported that “[s]he is excited to head  
13 to Spokane for a few days” and “[s]he will be traveling to Spokane with [her  
14 mother] and staying a week.” Tr. 492. In March 2020, Plaintiff reported that she  
15 was “in quarantine in Elk, Eastern Washington”<sup>4</sup> and would be unable to make her  
16 next appointment for an Abilify injection. Tr. 500. In May 2020, Plaintiff said she  
17 “went over to Spokane to visit her brother and nephews. She had a nice drive with  
18 her nephew and indicated it was a good trip.” Tr. 518. It is not clear whether these  
19 records reference one trip or multiple trips, nor do they reveal the nature and extent

---

20 <sup>4</sup> The town of Elk is located in Spokane County, approximately 30 miles from  
21 Spokane.

1 of Plaintiff's activities or social interaction while traveling. In this case, these few  
2 vague records, without more, do not constitute substantial evidence that Plaintiff  
3 engaged in activities inconsistent with her allegations.

4 Lastly, the ALJ observed that Plaintiff consistently attended her appointments  
5 independently and engaged appropriately with providers. Tr. 39. Attendance at  
6 intermittent appointments is not the same as attending work on a consistent and  
7 regular basis and the ALJ did not document how Plaintiff's behavior with regard to  
8 medical appointments is inconsistent with her allegations. While this may be a  
9 reasonable consideration if adequately supported by references to the record, this  
10 finding by itself is an insufficient basis for discounting Plaintiff's symptom  
11 statements.

12 Second, the ALJ found Plaintiff's statements and alleged limitations are  
13 inconsistent with modest mental status exam findings throughout the relevant period.  
14 Tr. 37-38. An ALJ may not discredit a claimant's pain testimony and deny benefits  
15 solely because the degree of pain alleged is not supported by objective medical  
16 evidence. *Rollins*, 261 F.3d at 857; *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th  
17 Cir. 1991); *Fair*, 885 F.2d at 601. However, the medical evidence is a relevant  
18 factor in determining the severity of a claimant's pain and its disabling effects.  
19 *Rollins*, 261 F.3d at 857. Minimal objective evidence is a factor which may be  
20 relied upon in discrediting a claimant's testimony, although it may not be the only  
21 factor. *See Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

1 The records cited by the ALJ indicate that during the relevant period, Plaintiff  
2 presented with a normal or euthymic mood at times and a depressed mood on other  
3 occasions. Tr. 37-38 (citing Tr. 465-66 (euthymic), 468 (depressed), 474  
4 (euthymic), 485-86 (sad, depressed), 748 (depressed)); *see also* Tr. 471 (depressed),  
5 476 (depressed), 483 (euthymic), 492 (euthymic), 494 (sad, labile), 496 (euthymic),  
6 512 (euthymic) 744 (euthymic), 744 (euthymic).<sup>5</sup> Other mental status exam findings  
7 in those same records were otherwise essentially normal. *See id.* Although mental  
8 status exams document some variable depression, the ALJ found that mostly normal  
9 findings such as speech, logical thought processes, and appropriate thought content  
10 undermine the degree of tearfulness, anxiety, and lability alleged. Tr. 38.

11 Plaintiff argues that she had telehealth or telephone appointments with Mr.  
12 Belete due to the COVID-19 pandemic, so her mental status exams “would not  
13 generally have been abnormal given that they were conducted with Plaintiff was at  
14 home.” ECF No. 14 at 14. However, neither Mr. Belete nor any other provider  
15 drew such a conclusion, and this assumption is not supported by the record. Plaintiff  
16 also observes that the ALJ did not cite records from Mr. Belete indicating what she  
17 characterizes as significant symptoms, such as an August 2020 record finding  
18 Plaintiff to be whining with anxious and depressed mood, emotional, and very

19 <sup>5</sup> Plaintiff cites other records indicating anxious mood in the record, but those  
20 records generally post-date the date last insured or are otherwise addressed above.  
21 ECF No. 14 at 19.

1 anxious, Tr. 764; records from fall 2020 wherein Plaintiff reported her symptoms  
2 were under control, Tr. 774, 781; and records from December 2020, February 2021,  
3 and April 2021, Tr. 931, 947, 975. ECF No. 14 at 14. However, these records are  
4 all dated after the date last insured.

5       Regardless, even if substantial evidence supports the ALJ's finding about the  
6 content of mental status exams during the relevant period, an ALJ may not discredit  
7 a claimant's pain testimony only because the degree of pain alleged is not supported  
8 by objective medical evidence. *Rollins*, 261 F.3d at 857 (9th Cir. 2001); *Bunnell*,  
9 947 F.2d at 346-47; *Fair*, 885 F.2d at 601. As discussed *supra*, the only other  
10 reason given by the ALJ for rejecting Plaintiff's symptom testimony involved  
11 analysis of her daily activities, which was based on error.

12       Defendant asserts the ALJ gave two other reasons for discounting Plaintiff's  
13 symptom claims, arguing the ALJ "noted inconsistencies in Plaintiff's reports about  
14 her impairments" and "found evidence that Plaintiff's conditions improved with  
15 treatment." ECF No. 18 at 11. Defendant cites references to the ALJ's recitation of  
16 the evidence which are not identified by the ALJ as reasons for rejecting Plaintiff's  
17 symptom statements. Tr. 38. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d  
18 1219, 1226 (9th Cir. 2009) (noting the Court "review[s] the ALJ's decision based on  
19 the reasoning and factual findings offered by the ALJ - not *post hoc* rationalizations  
20 that attempt to intuit what the adjudicator may have been thinking.").



1 The ALJ did not provide any other legally sufficient reason for discounting  
2 Plaintiff's testimony. Because a lack of supporting objective evidence cannot be the  
3 only reason for rejecting a claimant's symptom claims, the ALJ's reasoning is  
4 inadequate, and the matter must be remanded for reconsideration.

5  
6 **B. Abebe Belete, ARNP**

7 Plaintiff contends the ALJ erred by failing to properly consider the opinion of  
8 Abebe Belete, ARNP. ECF No. 14 at 11-15. For claims filed on or after March 27,  
9 2017, the regulations provide that the ALJ will no longer "give any specific  
10 evidentiary weight...to any medical opinion(s)..." *Revisions to Rules Regarding the*  
11 *Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5867-88 (Jan. 18,  
12 2017); 20 C.F.R. § 404.1520c. Instead, an ALJ must consider and evaluate the  
13 persuasiveness of all medical opinions or prior administrative medical findings from  
14 medical sources. 20 C.F.R. § 404.1520c(a) and (b). Supportability and consistency  
15 are the most important factors in evaluating the persuasiveness of medical opinions  
16 and prior administrative findings, and therefore the ALJ is required to explain how  
17 both factors were considered. 20 C.F.R. § 404.1520c(b)(2). The ALJ may, but is  
18 not required to, explain how other factors were considered. 20 C.F.R. §  
19 404.1520c(b)(2); *see* 20 C.F.R. § 404.1520c(c)(1)-(5).

20 In July 2021, Mr. Belete, a psychiatric nurse practitioner, completed a  
21 Medical Source Statement form. Tr. 1073-77. He listed diagnoses of bipolar

1 disorder, current episode depressed moderate; and post-traumatic stress disorder  
2 unspecified. Tr. 1077. He opined that Plaintiff has a marked difficulty in  
3 maintaining concentration and has a hard time remembering things, a hard time  
4 concentrating, and is usually easily distracted. Tr. 1073. Mr. Belete also opined that  
5 Plaintiff is unable to understand, remember, and carry out short and simple or  
6 detailed instructions in an eight-hour workday five days per week. Tr. 1073. He  
7 indicated that Plaintiff has no problems attending appointments, groups, or meetings  
8 as scheduled. Tr. 1075. Socially, Mr. Belete noted Plaintiff deals with anxiety and  
9 being isolated from others, that she goes outside a few times per month, and that she  
10 has difficulty being in crowds of people. Tr. 1075. He opined that Plaintiff is easily  
11 stressed, becomes anxious, and occasionally experiences psychotic symptoms; and  
12 that she is limited in daily activities and is unable to work on a sustained basis. Tr.  
13 1077. He noted that he has not observed her in a work setting and answered “N/A,”  
14 or “not sure” to most other questions regarding Plaintiff’s functional ability. Tr.  
15 1074-76.

16 The ALJ found Mr. Belete’s opinion unpersuasive for several reasons. Tr. 40-  
17 41. First, the ALJ also found that there is no support for Mr. Belete’s statement that  
18 Plaintiff is unable to work on a sustained basis. Tr. 41. The ALJ concluded this  
19 statement appears to be based in part on Plaintiff’s subjective reports. Tr. 41. A  
20 medical opinion may be discounted if it relies on a claimant’s unreliable self-report.  
21 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); *Bayliss v. Barnhart*, 427

1 F.3d 1211, 1217 (9th Cir. 2005). Having found that the ALJ’s assessment of  
2 Plaintiff’s subjective reports is based on error, *supra*, this reasoning is insufficient.

3 Second, the ALJ found the opinion was rendered more than a year after the  
4 date last insured and that the records pertaining to the relevant period are not  
5 consistent with the degree of limitation assessed in July 2021. Tr. 41. “It is obvious  
6 that medical reports are inevitably rendered retrospectively and should not be  
7 disregarded solely on that basis.” *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir.  
8 1988) (internal citations omitted); *see Turner v. Comm’r of Soc. Sec. Admin.*, 613  
9 F.3d 1217, 1228-29 (9th Cir. 2010) (“[E]vidence post-dating the [date last insured]  
10 is probative of . . . pre-[date last insured] disability.”); *Svaldi v. Berryhill*, 720 F.  
11 App’x 342, 343-44 (9th Cir. 2017) (indicating that medical opinion issued after the  
12 DLI should be considered because it referred to the chronic condition and symptoms  
13 during the relevant period). To the extent the ALJ rejected the opinion because it  
14 post-dated the date last insured, the finding is erroneous. Otherwise, the ALJ’s  
15 reasoning references the ALJ’s conclusions regarding the objective medical evidence  
16 which must be reconsidered on remand, as discussed *supra*.

17 The ALJ’s other reasons for rejecting Mr. Belete’s opinion are also based at  
18 least partially on the ALJ’s overall evaluation of the record which must be  
19 reevaluated as discussed throughout this decision. As such, Mr. Belete’s opinion  
20 must also be reconsidered on remand.

21 **C. Ankle Impairment**

1 Plaintiff contends the ALJ improperly found that she does not have a severe  
2 ankle impairment. ECF No. 14 at 15-18. At step two of the sequential process, the  
3 ALJ must determine whether there is a medically determinable impairment  
4 established by objective medical evidence from an acceptable medical source. 20  
5 C.F.R. § 404.1521. A statement of symptoms, a diagnosis, or a medical opinion  
6 does not establish the existence of an impairment. *Id.* After a medically  
7 determinable impairment is established, the ALJ must determine whether the  
8 impairment is “severe;” i.e., one that significantly limits his or her physical or  
9 mental ability to do basic work activities. 20 C.F.R. § 404.1520(c). However, the  
10 fact that a medically determinable condition exists does not automatically mean the  
11 symptoms are “severe” or “disabling” as defined by the Social Security regulations.  
12 *See e.g. Edlund*, 253 F.3d at 1159-60; *Fair*, 885 F.2d at 603; *Key v. Heckler*, 754  
13 F.2d 1545, 1549-50 (9th Cir. 1985).

14 At step two, the ALJ found that Plaintiff did not establish a severe ankle  
15 impairment before the date last insured. Tr. 33. In order to obtain disability  
16 insurance benefits, a claimant must establish disability before the date last insured.  
17 *See* 42 U.S.C. § 423(c); 20 C.F.R. § 404.1520. The burden of proof on this issue is  
18 on the claimant. *See Morgan v. Sullivan*, 945 F.2d 1079, 1080 -1081 (9th Cir. 1991)  
19 (citing *Gamer v. Sec’y of Health and Human Servs.*, 815 F.2d 1275, 1278 (9th Cir.  
20 1987)). In this case, Plaintiff’s date last insured is June 30, 2020, and Plaintiff must  
21 establish disability before that date. *See* Tr. 30.

1 The ALJ noted that Plaintiff testified that she has ankle pain that causes  
2 difficulty standing and walking and that she can only be on her feet for 45 minutes  
3 before needing to rest or sit down. Tr. 33. She testified that she elevates and ices  
4 her ankle three to four times a day every day. Tr. 33. The ALJ noted that in August  
5 2020, after the date last insured, Plaintiff first reported months of ankle pain to a  
6 provider. Tr. 34 (citing Tr. 690). The ALJ observed there is no documentation of  
7 her ankle condition before the date last insured. Tr. 34. Plaintiff was treated for  
8 ankle pain and swelling with medication and physical therapy, but the ALJ noted all  
9 treatment was after Plaintiff's date last insured. Tr. 34, 635-82, 705-10, 989-1007.  
10 Thus, the ALJ found a severe impairment was not established before the date last  
11 insured. Tr. 34.

12 Because this finding is based in part on the ALJ's consideration of Plaintiff's  
13 symptom testimony, and because Plaintiff's symptom testimony must be considered  
14 on remand, the ALJ should also reconsider Plaintiff's ankle impairment at step two.  
15 The Court makes no finding as to what the outcome should be on remand.

## 16 CONCLUSION

17 Having reviewed the record and the ALJ's findings, this Court concludes the  
18 ALJ's decision is not supported by substantial evidence and free of harmful legal  
19 error. The Court hereby remands the Commissioner's decision.

20 Accordingly,

21 1. Plaintiff's Brief, **ECF No. 14**, is **GRANTED**.

2. Defendant's Brief, **ECF No. 18**, is **DENIED**.

3. This case is **REVERSED** and **REMANDED** for further administrative proceedings consistent with this Order pursuant to sentence four of 42 U.S.C. § 405(g).

**IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order and provide copies to counsel. Judgment shall be entered for the Plaintiff and the file shall be **CLOSED**.

**DATED** May 16, 2024.

A handwritten signature in black ink, appearing to read 'Lonly R. Suiko', is written over a horizontal line.

LONLY R. SUKO  
Senior United States District Judge